Supreme Court, U.S.
FILED
JUN 3 1994
OFFICE OF THE CLERK

No. 93-1626

In the Supreme Court of the United States

OCTOBER TERM, 1993

LEROY EDWARD TRUEX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at trial showed multiple conspiracies instead of the single conspiracy charged in the indictment.

2. Whether prosecution of petitioner was barred by the statute of limitations.

3. Whether the trial court improperly admitted evidence of petitioner's previous marijuana smuggling activities.

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OPINION BELOW

The order of the court of appeals (Pet. App. 9) is unpublished, but the judgment is noted at 11 F.3d 165 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. A petition for rehearing was denied on January 14, 1994. Pet. App. 10-11. The petition for a writ of certiorari was filed on April 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 952(a) and 963. He was sentenced to eight years' imprisonment. The court of appeals affirmed. Pet. App. 9.

1. Petitioner was involved in a large marijuana smuggling operation run by unindicted co-conspirators Billy Harvey, Robert Castoro, and Parker Charles Peak. Gov't C.A. Br. 6. In November and December of 1984, Harvey and Castoro arranged with a group of Cuban co-conspirators to import a 50,000 to 100,000 pound cache of marijuana into the United States. *Id.* at 8. In November 1984, the first shipment of 36,000 pounds arrived in Florida via the Bahamas aboard three small Hatteras boats. Pet. 4.

In October 1984, Harvey and Peak began negotiations with petitioner, who had previously collaborated with Harvey on other marijuana smuggling ventures, for permission to unload the second shipment of marijuana at his dock in Cape Charles, Virginia. Gov't C.A. Br. 10. For a $1 million fee, petitioner agreed to permit the *Fatuk*, a boat ostensibly carrying frozen fish, to unload 53,000 pounds of marijuana at Cape Charles. *Id.* at 9-11. In January 1985, petitioner met with Peak and Harvey in Fort Lauderdale, Florida, and later in Marathon, Florida, to continue negotiations. In February 1985, he flew to Daytona Beach, Florida, to meet with Castoro. *Ibid.* Finally, Castoro and Harvey flew to Virginia to meet with petitioner and inspect the dock. *Ibid.*

After the *Fatuk* set sail for Cape Charles, petitioner informed Harvey that the co-owner of the dock had decided that they could not use it to unload the

contraband. Gov't C.A. Br. 11. Petitioner apologized for the change and explained that the matter was beyond his control. *Ibid.* Petitioner arranged for a small boat to meet the *Fatuk* and inform the captain of a new delivery site in Fall River, Massachusetts. *Ibid.* En route to Massachusetts, however, the *Fatuk* experienced mechanical problems and was seized by the Drug Enforcement Administration. *Id.* at 12.

Shortly after the failed *Fatuk* venture, the Cuban co-conspirators offered to let Harvey, Peak, and Castoro use their boat, the *Saja*, to smuggle another load of marijuana into the United States to offset the loss of the *Fatuk*'s 53,000 pound load. Gov't C.A. Br. 13. The *Saja* venture was ultimately abandoned, because the ship was being watched by Customs agents. Peak, Harvey, and Castoro used other means, however, to smuggle three more loads of marijuana into the country between 1985 and mid-1987.[1] *Id.* at 13-15.

2. On February 14, 1990, a five-count indictment was returned by a federal grand jury in the Middle District of Florida charging petitioner and 18 co-defendants with narcotics offenses.[2] On June 27, 1990, a three-count superseding indictment was returned charging petitioner in two counts with conspiring to possess in excess of 100,000 pounds of marijuana with intent to distribute

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[1] Those three loads of marijuana weighed, respectively, 35,000 pounds, between 25,000 and 30,000 pounds, and between 14,000 and 15,000 pounds. Gov't C.A. Br. 13-14.

[2] Petitioner was charged in four counts of that indictment with the following offenses: conspiring to possess in excess of 90,000 pounds of marijuana with intent to distribute it; possessing 90,000 pounds of marijuana with intent to distribute it; conspiring to import 56,000 pounds of marijuana aboard the *Fatuk*; and importing 56,000 pounds of marijuana aboard the *Fatuk* on or about February 20, 1985. See Pet. 10.

it, in violation of 21 U.S.C. 841 and 963, and conspiring to import in excess of 100,000 pounds of marijuana, in violation of 21 U.S.C. 952(a) and 963. The indictment alleged that both conspiracies were in existence between December 1984 and March 1985. Gov't C.A. Br. 2.

On October 24, 1990, a second three-count superseding indictment was returned. Counts Two and Three of the second superseding indictment alleged additional overt acts pertaining to marijuana importations that occurred after the failed *Fatuk* venture. In addition, the conspiracies were alleged to have been in existence between December 1984 and September 1987, rather than between December 1984 and March 1985. Petitioner was tried on the second superseding indictment. Pet. 11.

3. At trial, unindicted co-conspirator Castoro testified as a government witness. Through Castoro's testimony, the government introduced evidence that petitioner had imported marijuana on previous occasions with Harvey. Gov't C.A. Br. 68. Peak, another government witness, corroborated Castoro's testimony relating to petitioner's prior involvement in marijuana smuggling by testifying that petitioner told him that his docks had been used previously to off-load marijuana. *Ibid.* In its closing arguments, the government asserted that that testimony demonstrated petitioner's knowledge of the ongoing nature of the smuggling conspiracy into which he entered. Pet. 27; Gov't C.A. Br. 69.

At the close of the evidence, petitioner requested that the jury be instructed to acquit petitioner if it found that the *Fatuk* venture was a separate conspiracy, because the five-year statute of limitations would have expired on that offense. The court declined to give petitioner's proposed instruction, but it did administer the following multiple-conspiracies instruction:

With regard to the alleged conspiracy offenses alleged in Counts Two and Three, the Government must prove beyond a reasonable doubt the existence of the overall conspiracy charged in each Count. Proof of several conspiracies is not proof of the single, overall conspiracy charged in the Indictment unless one of the several conspiracies which is proven is the single conspiracy which the Indictment charges. What you must do is determine whether the single conspiracy charged in the Indictment existed between two or more conspirators. If you find that such conspiracy existed, then you must determine who were the members of that conspiracy.

If you find that a particular Defendant is not a member of a conspiracy or is a member of another conspiracy which is not the one charged in the Indictment, then you must acquit the Defendant. In other words, to find a Defendant guilty, you must find that he was a member of the conspiracy charged in the Indictment and not some other, separate conspiracy.

* * * * *

If you find that there were two or more separate agreements to participate in particular marijuana transactions, and that a particular Defendant joined one of the separate agreements, you must still acquit that Defendant unless you also find beyond a reasonable doubt that he had some understanding of the common purpose and goal of the overall plan charged in the Indictment with those who joined the other agreement or agreements that you have found to exist. In other words, if you find that a Defendant

> agreed to participate in one of the transactions engaged in by the larger conspiracy, but that he did not know of the essential features and purpose of that overall conspiracy as alleged in the Indictment, you must acquit him.
>
> * * * * *
>
> Proof that over the years separate unrelated transactions involving marijuana took place is not proof, without more, that a common plan or understanding existed for the continuing agreement alleged in the Indictment.
>
> * * * * *
>
> Therefore, if the government proves that a Defendant intended to participate in one of the ventures charged in the Indictment to possess with intent to distribute and import marijuana, but did not have knowledge of and did not intend to be a part of a continuing venture charged in the indictment which involved additional shipments of marijuana, then you must find the Defendant not guilty, for the Government would not have proven beyond a reasonable doubt that the Defendant intended to participate in the conspiracy charged in the Indictment.

Pet. C.A. Br. 27-28 (citing R5-589-11-15) (emphasis omitted). The jury found petitioner guilty of conspiring to import in excess of 100,000 pounds of marijuana, but acquitted him of conspiring to possess in excess of 100,000 pounds of marijuana with the intent to distribute it.

4. On appeal, petitioner claimed that the proof at trial established multiple conspiracies, not a single over-

arching one, and, therefore, that there had been material variance. Pet. C.A. Br. 31-37. Petitioner also argued that the district court impermissibly admitted evidence of his prior bad acts through Castoro's testimony, in violation of Fed. R. Evid. 404(b). Pet. C.A. Br. 44-47. Finally, petitioner contended that the district court erred in failing to give the jury instruction he requested regarding the statute of limitations. The court of appeals summarily affirmed. Pet. App. 9.

ARGUMENT

1. Petitioner first renews his claim that the proof showed multiple conspiracies, rather than the conspiracy charged in the indictment. Petitioner argues that there was therefore a variance between the indictment and the proof at trial. In addition, petitioner claims that the government's purported failure to prove the conspiracy charged in the indictment entitles him to an acquittal. Pet. 16. Petitioner's fact-bound claims do not merit further review.

a. To prevail on his variance claim, petitioner must demonstrate that any variance prejudiced his substantial rights. *Kotteakos* v. *United States*, 328 U.S. 750, 756 (1946). Petitioner does not claim surprise, or any other prejudice resulting from lack of notice of the charges against him. Nor does petitioner contend that the elements of the offense for which he was convicted were not set out in the indictment. Any such claims would be unfounded, because the overt acts concerning the *Fatuk* venture were pleaded in the indictment (Pet. 11) and the indictment contained all of the elements of the offense of a conspiracy under 21 U.S.C. 952(a) and 963. Because petitioner cannot demonstrate prejudice, his variance claim lacks merit. See *United States* v. *Miller*, 471 U.S. 130, 134-136 (1985) ("Convictions generally have been

sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment.").[3]

b. Petitioner's sufficiency claim is likewise unworthy of further review. Whether the government's evidence showed a single conspiracy or multiple conspiracies is a question of fact left to the jury. See *United States* v. *Friedman*, 854 F.2d 535, 561 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989); *United States* v. *Tarantino*, 846 F.2d 1384, 1391 (D.C. Cir.), cert. denied, 488 U.S. 867 (1988); *United States* v. *Champion*, 813 F.2d 1154, 1165 (11th Cir. 1987); *United States* v. *Smith*, 789 F.2d 196, 200 (3d Cir.), cert. denied, 479 U.S. 1017 (1986). A reviewing court should not disturb a jury's determination that a single conspiracy existed, unless no rational trier of fact could have reached that conclusion. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

Moreover, as the lower courts have recognized, there can be separate agreements within a single overall conspiracy. *United States* v. *LaFraugh*, 893 F.2d 314, 318 (11th Cir.), cert. denied, 496 U.S. 911 (1990); *United States* v. *Diecidue*, 603 F.2d 535 (5th Cir. 1979), certs. denied, 445 U.S. 946 and 446 U.S. 912 (1980). As the Second Circuit has noted, "where there was proof of the single, overall conspiracy, the fact that there also was evidence adduced of other conspiracies or that the jury could have found two major conspiracies does not require a mandatory charge of acquittal." *United States* v. *Tramunti*, 513 F.2d 1087, 1108, cert. denied, 423 U.S. 832 (1975).

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[3] Petitioner makes no claim that the evidence at trial constructively amended the indictment, in violation of his Fifth Amendment right to be tried on an indictment returned by a grand jury. See *United States* v. *Miller*, 471 U.S. at 135-136.

Here, the scale of the operation allowed the jury to find that petitioner was aware that he was participating in a large, even if loosely structured, organization. The members had a common goal (the importation of large quantities of marijuana), which they accomplished through a common method (the use of sea-going vessels). The members of the organization depended on each other's assistance for the success of their importation ventures. The jury could properly find that each member was aware that the importation ventures required combined efforts and that completion of the operation required the complicity of members having no direct relationships. See, *e.g.*, *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). In sum, the evidence demonstrated all the requisite indicia of a single conspiracy. See *United States* v. *Brito*, 721 F.2d 743 (11th Cir. 1983); see also *United States* v. *Tramunti*, 513 F.2d at 1106.

In addition, the jury was instructed that it could not convict petitioner if it found that he was involved in discrete conspiracies, and not the broader conspiracy alleged in the indictment. That precaution guarded against conviction on the improper basis alleged by petitioner. *United States* v. *Dennis*, 917 F.2d 1031, 1033 (7th Cir. 1990); *United States* v. *Cambindo Valencia*, 609 F.2d 603, 625 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980). Petitioner's disagreement with the conclusion of a properly instructed jury does not warrant further review.

2. Petitioner next claims that his prosecution was barred by the statute of limitations. That claim lacks merit. Under 18 U.S.C. 3282, a superseding indictment is timely if the original indictment was timely and the charges in the two indictments are substantially the same. See *United States* v. *Italiano*, 894 F.2d 1280, 1282

(11th Cir.), cert. denied, 498 U.S. 896 (1990); *United States* v. *Gengo*, 808 F.2d 1, 3-4 (2d Cir. 1986); *United States* v. *Grady*, 544 F.2d 598, 602 (2d Cir. 1976). Petitioner concedes, as he must, that the original indictment was timely. Pet. 20. He contends, however, that the original indictment charged only "the *Fatuk* conspiracy," which was different from the conspiracy charged in the second superseding indictment on which he was tried. Pet. 19. That contention is based on the same erroneous premise that underlies petitioner's claim that the evidence was insufficient to convict him—*i.e.*, that the conspiracy charged in the second superseding indictment must be deemed "different" from the purportedly more limited "*Fatuk* conspiracy" if it is theoretically possible to characterize them as different.[4]

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[4] Petitioner also bases his limitations claim on his repeated assertion that he withdrew from the conspiracy at the time of the *Fatuk* venture. See Pet. 19-20, 22. A withdrawal defense, however, requires not only that a defendant have ceased participating in the conspiracy, but also that he either have disclosed the conspiracy to the authorities or at least have done some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). This Court has long held that a defendant who claims that he withdrew from the conspiracy must show some "affirmative action" constituting withdrawal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). In *Hyde*, the Court ruled that a defendant's participation in a conspiracy continues whether or not he performs acts in furtherance of the conspiracy, and that "until he does some act to disavow or defeat the purpose he is in no situation" to assert a withdrawal defense. *Ibid.* In accordance with *Hyde*, the overwhelming majority of the courts of appeals have held that a defendant bears the burden of proving his withdrawal from a conspiracy. See, *e.g.*, *United States* v. *Dyer*, 821 F.2d 35, 39 & n.6 (1st Cir. 1987); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S.

The indictment charged and the jury necessarily found, however, that the *Fatuk* venture was merely a part of the broader conspiratorial agreement, not a separate "conspiracy."

There is no greater merit to petitioner's related claim (Pet. 25) that the district court erred in declining to charge the jury to acquit him if it found that the *Fatuk* scheme was a separate conspiracy, because that conspiracy would be barred by the statute of limitations. The district court instructed the jury to acquit petitioner if it concluded that the defendants were not members of the conspiracy charged in the indictment, but rather members of some other conspiracy or of multiple conspiracies. See pp. 5-6, *supra*. That instruction encompassed the instruction sought by petitioner, because both instructions required acquittal if the jury found that the *Fatuk* venture was a separate conspiracy. Petitioner was not entitled to have the same concept repeated to the jury in words of his choosing. See, *e.g.*, *United States* v. *Kim*, 884 F.2d 189, 193 (5th Cir. 1989); *United States* v. *Taylor*, 562 F.2d 1345, 1364 (2d Cir.), cert. denied, 432 U.S. 909 (1977).

3. Finally, petitioner renews his claim (Pet. 26-29) that the district court violated Fed. R. Evid. 404(b) by

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960 (1965); *United States* v. *Gillen*, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Branch*, 850 F.2d 1080, 1082-1083 (5th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); *United States* v. *Lash*, 937 F.2d 1077, 1083 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991); *United States* v. *Granados*, 962 F.2d 767, 773 (8th Cir. 1992); *United States* v. *Russell*, 963 F.2d 1320, 1323 (10th Cir.), cert. denied, 113 S. Ct. 280 (1992); *United States* v. *Finestone*, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948 (1987). Petitioner did not establish a withdrawal defense at trial, and he is therefore precluded from treating his purported withdrawal of the conspiracy as an established fact in this Court.

permitting Castoro and Peak to advert to petitioner's previous experience smuggling marijuana with Harvey. That fact-bound claim is meritless.

Rule 404(b) provides that evidence of a defendant's other crimes, wrongs, or acts is not admissible "to prove [his] character * * * in order to show action in conformity therewith." The Rule, however, does not limit the evidence that may be admitted on the charge on which the defendant is being tried, or the introduction of extrinsic act evidence for any other relevant purpose, such as showing the defendant's intent or motive. As a leading treatise notes, "[o]nly one sequence of [evidential] hypotheses is forbidden in criminal cases by Rule 404: the idea that one who commits a crime probably has a defect of character, and that someone who has such a defect is more likely than others to have committed the act in question." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404(08), at 404-43 (1993). See also *Huddleston* v. *United States*, 485 U.S. 681, 687 (1988) (Rule 404(b) "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character").

Petitioner argues that the government's 404(b) evidence was offered to show his criminal propensity. In fact, as confirmed by the government's closing arguments, the government offered the evidence to prove that petitioner's smuggling experience with Harvey demonstrated that petitioner was aware of the continuing nature of the smuggling conspiracy for which he was being tried, and that he knowingly joined that conspiracy. See Gov't C.A. Br. 69. That evidence was therefore properly admitted on the issue of petitioner's knowledge or intent, and it was especially relevant in light of petitioner's claim that he had no knowledge of any smuggling activity other than the *Fatuk* venture.

Citing *Huddleston*, petitioner also complains (Pet. 27-28) that there was insufficient proof that he engaged in the prior wrongs with Harvey, and that the district court erred by not making a preliminary determination that he had. But, as *Huddleston* made clear, the district court need not make "a preliminary finding * * * that the Government has proved the act by a preponderance of the evidence." 485 U.S. at 689. Rather, the court simply "decides whether the jury could reasonably find the conditional fact—here, that [petitioner had engaged in previous off-loads with Harvey]—by a preponderance of the evidence." *Id.* at 690. Two witnesses, Castoro and Peak, testified that petitioner told them that he had previously off-loaded marijuana with Harvey and that he had previously used his docks for marijuana off-loads. Gov't C.A. Br. 69. The district court therefore correctly determined that the evidence was sufficient for a jury to find, by a preponderance of the evidence, that petitioner had in fact done so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994